UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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| ROBERT GODFREY,<br>Appellant,<br><br>v.<br><br>DEPARTMENT OF THE AIR FORCE,<br>Agency. | DOCKET NUMBER<br>BN122189W0214<br><br>DATE: MAY 24 1990 |

Martin R. Cohen, Esquire, Philadelphia, Pennsylvania, and Mark D. Roth, Esquire, Washington, D.C., for the appellant.

Major W. Jan Faber, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

## OPINION AND ORDER

The appellant has filed a petition for review of an initial decision, issued on November 16, 1989, that dismissed his appeal. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appellant's appeal.

## BACKGROUND

On July 12, 1989, the agency issued the appellant a reprimand for being away from his work area without permission on June 19, 1989. *See* Agency File, Tab 4c. The appellant grieved the reprimand on July 24, 1989. See Agency File, Tab 2c. In September 1989, the appellant also petitioned the Board's Boston Regional Office for appeal of the reprimand under the provisions of the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified in scattered sections of Title 5 of the United States Code) (the Act).

The appellant asserted that the reprimand constituted reprisal for engaging in whistleblowing activities. On October 16, 1989, however, the agency cancelled the appellant's reprimand effective October 12, 1989. It then moved to dismiss the appellant's petition for appeal, arguing that the Board lacked jurisdiction on three bases: The agency proposed the appellant's reprimand before the effective date of the Whistleblower Protection Act, the appellant elected to process his case under the exclusive grievance procedures of the collective bargaining agreement, and it had rescinded the reprimand. *See* Initial Appeal File (IAF), Tab 7.

Relying solely on the last basis in the agency's motion, the administrative judge dismissed the appellant's

petition for appeal as moot.[1] She rejected the appellant's arguments that the Board should take jurisdiction because his appeal involved both present and future improper actions by management and because the rescission was not a complete remedy. She found that the appellant had been restored to the status quo ante, and that there was no evidence that the appellant suffered any adverse impact from the reprimand. Relying on *Ferguson v. Department of Justice*, 23 M.S.P.R. 55, 56 (1984), and *Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981), she concluded that when an agency completely rescinds the personnel action that is the subject of an appeal before the Board and the appellant is returned to the status quo ante, the Board is divested of jurisdiction over the appeal.

The administrative judge further found, in response to the appellant's request, that the Board had no authority in this case to order the agency's management officials to be disciplined or transferred to another location. She found that such action could be ordered only if the Board found that a prohibited personnel action had been taken. She found that the Board lacked authority to make such a determination in this case because the agency's rescission of the reprimand had divested the Board of jurisdiction. The administrative judge concluded that nothing in the Act allowed an employee to file an appeal from a future unknown

[1] Because of this, the administrative judge did not decide whether the Board also lacked jurisdiction for the other two reasons urged by the agency.

action that might be taken by an agency, or gave the Board authority to order a continuing stay against a future personnel action.[2]

## ANALYSIS

The agency's cancellation of the appealed reprimand renders it moot.

In his petition for review, the appellant asserts that the administrative judge erred in dismissing his appeal as moot because he is seeking ongoing protection from future agency retaliation for his whistleblowing activities. He also contends that the agency's rescission action did not provide a complete remedy because he sought the suspension of five managers for 30 days and their transfer to another location, and he asks that the Board issue a continuing stay prohibiting the agency from taking any personnel action against him until a full evidentiary hearing is held before the Board.

The Board addressed this argument in *Mulherin v. Department of the Air Force*, MSPB Docket No. BN122189W0212 ( MAY 24 1990 ).[3] It found that the administrative judge

[2] We note that in a footnote on page 3 of the initial decision, the administrative judge mistakenly identified the agency's action as a 5-day suspension. The error, however, did not prejudice the appellant's substantive rights and thus provides no basis for reversal of the initial decision. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

[3] As in *Mulherin v. Department of the Air Force*, MSPB Docket No. BN122189W0212 ( MAY 24 1990 ), we have not considered the appellant's submission of a summary of an investigation report after the close of the petition for

properly dismissed the appeals in that case as moot because the agency had cancelled the actions against the appellant. In doing so, the Board concluded that it should follow its holding under its pre-Act appellate jurisdiction that an agency's rescission of an action divests the Board of jurisdiction over an appellant's appeal. In addition, it found that there was nothing to stay because the action against the appellant had been cancelled. Finally, it found that the appellant's request that disciplinary action be taken against his managers was not within the scope of the Board's authority in an appeal under 5 U.S.C. § 1221.

In the present case, as previously mentioned, the agency also rescinded the appellant's reprimand. *See* IAF, Tab 7. Furthermore, the record does not indicate that the appellant was left in a worse position as a result of the cancellation than he would have been in if the matter were adjudicated. Rather, the agency has afforded the appellant relief equivalent to that which he could have received from the Board.

Accordingly, we conclude that the administrative judge properly found that the appeal of the reprimand became moot as a result of the cancellation of the appealed action.[4]

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review record because it could not affect the results in this case. *See* 5 C.F.R. § 1201.114(i) (1989); *Black v. United States Postal Service*, 38 M.S.P.R. 272, 274 (1988).

4 Because of this finding, we conclude, as did the administrative judge, that it is unnecessary to decide whether the appeal should also be dismissed for the two other reasons propounded by the agency.

The appellant's claims of "ongoing harassment, retaliation and threats" provide no basis for the assertion of Board jurisdiction.

As noted above, the appellant argues that the appeal remains within the scope of the Board's jurisdiction under the Act because he seeks protection from perceived current and future reprisals. In addition to the disciplinary actions noted previously, he requests that the Board "issue a continuing stay against the Air Force prohibiting any undesired personnel action of any sort being taken regarding the appellant." He has made these assertions in both his response to the agency's motion to dismiss, *see* IAF, Tab 10, and his petition for review (PFR), *see* PFR File, Tab 1, as well as in correspondence and submissions both preceding and subsequent to the motion. *See, e.g.*, IAF Tabs 1, 3, 11, and 12.[5] We find, however, that even now these allegations remain so lacking in specificity that they cannot serve to invoke the Board's jurisdiction under the Act, and thus agree with the administrative judge that they neither prevent the appeal of the reprimand from being moot nor provide an additional basis for appeal.

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[5] Although the appellant states that these assertions were also raised to the Special Counsel in correspondence dated July 21, 1989, the record does not contain a copy of a July 21 letter containing any such allegations. Nor does the Special Counsel's August 29, 1989 "closure letter" discuss these issues. Nonetheless, the record clearly shows that the overall matter was raised to the Office of Special Counsel, that more than 120 days have passed, and that it is, therefore, properly before the Board. *See* IAF, Tab 3.

The Board's jurisdiction under the Act extends to personnel actions that are threatened because of whistleblowing activities. 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.2. Moreover, the Board has recently held that Congress intended a broad interpretation of the term "threatened" when it passed the Act. *Gergick v. General Services Administration*, MSPB Docket No. SL12219OS0030, slip op. at 6 (February 28, 1990). Indeed, as we noted there, the legislative history of the Act states that "[m]ere harassment and threats, without any formally proposed personnel action, can constitute a prohibited personnel practice...." 135 Cong. Rec. S2784 (daily ed. Mar. 16, 1989).

We find no evidence in the legislative history, however, that Congress intended to extend the right to bring an Individual Right of Action appeal to the Board under 5 U.S.C. § 1221 based solely on generalized assertions and fears unsupported by reference to any specific matter. On the contrary, even the broadest interpretation of Congressional intent, as exemplified by the excerpt from the Congressional Record quoted immediately above, strongly suggests that <u>some</u> concrete manifestation--(such as) "mere harrassment and threat"--is required. Accordingly, for a right of appeal to accrue under the Act, the appellant must cite a threatened, proposed, taken, or not taken "personnel action." That term, defined at 5 U.S.C. § 2302(a)(2) and 5 C.F.R. § 1209.5(a), includes a broad range of actions that

may affect an employee, former employee, or applicant, but each is a concrete matter that can be taken or done by an agency, and reviewed (and undone) by the Board. With the exception of the now-cancelled reprimand, the appellant has pointed to nothing that the Board may examine as evidence of a prohibited personnel practice.

In the appellant's affidavit, he states that "[t]he documents we have submitted, as well as this affidavit, factually support our belief that [his] supervisors have not only taken retaliatory acts ... but hope, plan, and expect to in the future have us fired and/or disciplined etc...." IAF, Tab 12. Review of that document, though, as well as of the rest of the record, is unavailing with respect to that basis of "factual[] support." While the appellant submitted statements concerning the degree of discipline meted out to employees who have not been whistleblowers, arguing that he would have been treated more harshly, *see, e.g.*, IAF, Tab 3; appellant's affidavit, IAF, Tab 12, absent evidence that he was, in fact, so disadvantaged, the Board finds no matter in these generalized contentions that falls within the scope of its broadened jurisdiction under the Act.

Accordingly, we conclude that the appeal was properly dismissed.

## ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

## NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.